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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

HASSNEH INSURANCE COMPANY OF ISRAEL, LTD.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Respondent.

JOHN GARAMENDI, INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA
Real Party in Interest

PETITION FOR WRIT OF CERTIORARI FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

BRIEF IN OPPOSITION FOR REAL PARTY IN INTEREST

KARL L. RUBINSTEIN
DANA CARLI BROOKS
ROBERT H. NUNNALLY, JR.
KATHLEEN M. MCCAIN
RUBINSTEIN & PERRY
Counsel of Record for
Real Party in Interest
2600 Wilshire Boulevard
Los Angeles, CA 90057
Telephone: (213) 487-4769

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BRIEF IN OPPOSITION FOR REAL PARTY IN INTEREST

INTRODUCTION

Petitioner, Hassneh Insurance Company of Israel has filed the instant Petition for Writ of Certiorari claiming for the first time that the Respondent Court's decision constituted a violation of its due process and equal protection rights under the Fourteenth Amendment of the United States Supreme Court. The lower court decision, an Interim Trial Ruling on the Commissioner's

Motion for Judgment on the Pleadings regarding the issue of rescission, was presented to both the California Court of Appeals and the California Supreme Court by way of writ of mandate and a Petition for Review. Petitioner did not raise the federal questions presented in the instant Petition in any of the three lower courts. Even assuming that Petitioner has properly preserved its federal claims, the truth of the matter is that their claims have no merit. The true legal issues are issues of state law, not federal law, and do not rise to the level of review by this Court.

In February 1987, the California Insurance Commissioner (the "Commissioner") was forced to place the Mission Companies[1] into liquidation due to the fact that several hundred of their reinsurers, most of whom were alien companies, refused to pay over $2.5 billion due in reinsurance recoverables. Over the ensuing years of litigation, these reinsurers have offered no valid basis for withholding these sums. Rather, they have simply continued to cling to vague and global assertions that they were somehow defrauded by a Mission Insurance Company ("MIC") affiliate, Pacific Reinsurance Management Corporation ("PRMC") and its employees. These same assertions are set forth in Hassneh Insurance Company of Israel's ("Hassneh") Petition for Writ of Certiorari.[2]

PRMC was an affiliate of the Mission Companies and it acted as the manager of a reinsurance pool, in which

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[1]The Mission Companies that were placed into liquidation in February 1987 were Mission Insurance Company, Mission National Insurance Company, Mission Reinsurance Corporation, Enterprise Insurance Company and Holland-America Insurance Company.

[2]Petitioner is one of 23 defendants in the underlying action. Most of the defendants are foreign insurance or reinsurance companies. None of the other defendants have formally joined in this Petition.

Hassneh, other reinsurers and MIC participated. This reinsurance pool operated from 1970 to 1984. The insurance policies and/or the reinsurance treaties, underwritten by PRMC on behalf of the pool, were issued with MIC as the reinsurer. These treaties were then retroceded or re-reinsured to the pool participants. As the reinsurer on these treaties, MIC is primarily liable for the losses on these treaties. Each of the pool participants, such as Hassneh, then assumed a pro-rata share of the reinsurance so assumed. Through this relationship, a joint venture was created with MIC acting as the fronting company.[3] This was done to simplify compliance with California Insurance law for the various ceding companies. Hassneh, as one of the reinsurers, took its share of the venture as a retrocessionaire of MIC through various agreements with PRMC and MIC.

Hassneh participated in the treaty reinsurance pools managed by PRMC from July 1979 to June 1983. Hassneh and the other pool participants' participation in the PRMC pools was profitable for many years. These participants happily took the millions of dollars in reinsurance premiums that were paid to them, and made no complaints and asked no questions until the good times were over and the entire insurance and reinsurance industry, the PRMC Pool operations included, began to suffer huge and unexpected losses. Then, at the very point at which the insurance-buying public became the most reliant upon

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[3]Hassneh claims in its Petition that the fronting arrangement with Mission Insurance Company was both "secret" and contrary to instructions given PRMC by certain pool members. The Commissioner disputes both allegations.

them, these participants, Hassneh included, suddenly concocted their fraud defenses and refused to pay.[4]

The conclusion which the Respondent court reached, that rescission is not available to Petitioner, is based on well settled legal principles. Petitioner argues that the trial court's Interim Trial Order sanctions fraud and underlines the state's failure to effectively regulate the insurance industry.[5] Nothing could be further from the truth.

The effect of the trial court's order will be to force reinsurers, such as Hassneh, to engage in good business practices and to make the type of inquiries responsible and professional business persons should make. Reinsurers have been given a clear message that they have to honor their reinsurance agreements and cannot cry fraud to escape the financial consequences of their own lack of due diligence. Unquestionably, the only reinsurers that will be adversely affected are those few reinsurance operations which willingly back out of contracts that they freely entered into when they finally discover that the benefits they have received are accompanied by corresponding duties. In fact, all Petitioner is really seeking is the ability to continue to act irresponsibly in its business by continuing with its "ostrich-like posture"[6] at the expense of the insurance-buying public.

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[4]It would perhaps be fair to say that over the several years of litigation, some 29 of the original 54 defendants have dropped these claims and have paid or are paying what they owe.

[5]Petitioner argues that state regulation of insurance and particularly, the state's failure to regulate is the "salient issue." *See*, Petition, at page 5. The Commissioner disputes this allegation as well as the implication that this issue was before the Respondent Court.

[6]Interim Trial Ruling at page 2.

ARGUMENT

I.

THE PETITION IS PROCEDURALLY DEFECTIVE

A. Petitioner Did Not Preserve Its Federal Questions in the Lower Courts

The threshold requirement for Supreme Court review is that the federal questions raised in the Petition must have been presented to the state court. As applied to the circumstances of Hassneh's Petition, 28 U.S.C. Section 1257 requires that in the state courts, Petitioner has "specially set up or claimed under the Constitution . . . of the United States" the violation of the rights Petitioner now asks be reviewed. Additionally, Supreme Court Rules, Rule 14 (h) requires Petitioner to specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts.

It is axiomatic that raising a federal question for the first time in a petition for writ of certiorari is not sufficient to confer jurisdiction upon the United States Supreme Court to consider that question. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Webb v. Webb*, 451 U.S. 493, 499 (1981). There are both policy and practical considerations for the requirement that federal questions must be presented to the state courts. These considerations include principles of comity, such that state courts are afforded the opportunity to perform their duty; it allows for the identification of any independent and adequate state grounds, such that federal review would be denied; and it allows for the possibility that the state

court ruling may obviate any reason for review. *Webb*, at 499, 500.

Petitioner has presented for the first time in its Petition for Writ of Certiorari to this Court the question of alleged violations by the Respondent Court of its rights to due process and equal protection pursuant to the Fourteenth Amendment of the United States Constitution. These issues were never made part of the record before the Respondent Court. Moreover, Petitioner never raised these issues for consideration in either of the two prior appellate courts from which it sought relief. It is important to note that Petitioner has not complied with Supreme Court Rules, Rule 14 (h) by setting forth in its Petition for Writ of Certiorari, the method and manner of raising the federal questions in the lower court as well as setting forth the lower court's ruling with respect to these questions. Since Petitioner has therefore, not preserved its federal question for review by this Court, its Petition for Writ of Certiorari should be denied.

B. Petitioner Has Presented No Basis for Jurisdiction

1. *There Has Been No Final Judgment*

Hassneh argues that this Court has jurisdiction pursuant to 28 U.S.C. Section 1257. This section confers jurisdiction upon this court to review by writ of certiorari "a final judgement or decree rendered by the highest court of a State in which a decision could be had." A final judgment is one that has been defined to finally determine all issues as to all parties involved, leaving nothing to be done but execution of the judgment. *St. Louis, Iron Mountain & S. R.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28-29 (1883). The requirement of finality of 28 U.S.C. 1257 serves to avoid piecemeal review by federal courts of state court decisions, to avoid rendering advisory opinions in

cases where there may be no case or controversy and to limit unnecessary federal intrusion in state affairs. *See, Pope v. Atlantic C. L. R. Co.* 345 U.S. 379, 381-382 (1953); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.* 414 U.S. 156, 159 (1973). Questions regarding whether or not a state court decision is final such that jurisdiction is conferred upon the United States Supreme Court to review the decision are borne by the petitioner and should be resolved against jurisdiction because of "the policy against premature constitutional adjudications." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71, (1948). A ruling rendered by a state court in the midst of trial is a paradigm of non-finality. Immediate review of such a decision would completely disrupt the orderly trial process.

There has been no final judgment rendered in the underlying case. Petitioner is asking this Court to review an interim trial ruling of the California Superior Court, a trial court. Review of this decision at this time would be disruptive of not only the orderly trial process but would also be contrary to the orderly process of the liquidation of the Mission Companies. (The liquidation process is discussed in further detail below.)

Further, contrary to the argument of Petitioner, the Respondent Court's ruling has not effectively ended the litigation as to all issues. There are still outstanding issues to be decided by the lower court, specifically issues relating to the nature and the amount of damages. Further, Petitioner's rights regarding fraud and its attendant remedies are fully preserved by the very terms of the lower court's order, they are merely reconciled with the insolvency provisions of the California Insurance Code.

2. Petitioner's Claim of Conflicting California Authority on the Same Issue Does Not Warrant Grant of Certiorari

As set forth above, this Court's jurisdiction is dependant upon a legitimate federal question being at issue. It is pure sophistry to suggest, as does Petitioner, that conflicting intrastate authority, can, in and of itself, become a federal question. Clearly, there must be something more. According to the Supreme Court Rules, a review by writ of certiorari is a matter of judicial discretion and will be granted only where there are special and important reasons for such review. Supreme Court Rules, Rule 10.1. Supreme Court Rules, Rule 10.1 (a) through (c) sets forth the "character of reasons that will be considered" in determining whether to grant certiorari, although stating that the reasons set forth therein are "neither controlling nor fully measuring the Court's discretion." A conflict in intrastate authority is not included within those reasons. Further, as this Court stated in *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 165, 166 (1917):

> The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, no does it enable this Court to revise the decisions of the state courts upon questions of state law.

Therefore, even assuming that there was a conflict, as a general matter, there is no due process protection for merely erroneous development of state law. *American Ry. Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927).

Hassneh argues that a basis for jurisdiction arises because of an alleged conflict between the Respondent

Court's decision and previous rulings on the same issue by the California Courts. Petitioner has cited this Court to the case *Prudential Reinsurance Co. v. Superior Court*, 216 Cal. App. 3d 1321, 265 Cal. Rptr. 386, (1989), *review granted*, 268 Cal. Rptr. 542 (1990).[7] Petitioner claims that issues which were the subject of a prior decision the California Court of Appeal in another, separate lawsuit involving the Mission Insurance Companies was a decision on the same issues. Petitioner correctly points out that the issues addressed in the prior decision relate to set-off and that that decision is presently pending before the California Supreme Court. However, the issues pending before the Supreme Court are not related to the issues addressed in the present Petition.

In fact, the issues in the *Prudential Reinsurance* decision and this case are not related in the sense argued by Petitioner. In the instant case, the lower court is not determining whether Petitioner has a right to set-off under California Insurance Code section 1031, the issue which is the subject of the *Prudential Reinsurance* case. Rather, the lower court has addressed issues of whether Petitioners can rescind their contracts or assert fraud as a defense to the enforcement of these contracts in light of the particular circumstances of the underlying action.[8]

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[7]Petitioner should know that this case is not citable authority since review has been granted by the California Supreme Court.

[8]Petitioner either misunderstands the trial court order or is deliberately attempting to elevate the trial court's dicta to its holding. The setoff issue relates to the mutuality of obligations between reinsurers on reciprocal reinsurance agreements where insurance companies both cede and accept reinsurance to and from one another via separate agreements. In this case, there is one agreement between each Petitioner and Mission. Therefore, other than collected but unpaid premium (which the Commissioner does not concede is

Petitioner cannot and has not presented any evidence to support its claim that these issues are the same or related other than that they arise out of the same liquidation. The legal issue actually decided by the lower court was that Petitioner could not have rescission for the following primary reasons: the rights of innocent third parties have intervened such that it is impossible to return to the status quo ante and the rights of the parties were fixed at liquidation. This holding is well supported in law and by the facts of this case and should not be disturbed. Petitioner cannot establish a basis for jurisdiction, since as set forth above, there is no conflict with previous rulings.

3. *Petitioner's Claim of Conflicting Case Authority Does Not Warrant Grant of Certiorari*

Petitioner argues that the Interim Trial Order is contrary to existing case law, is thus an abuse of discretion and therefore, there is a basis for jurisdiction in this Court. Assuming that Petitioner could show that jurisdiction was properly invoked due to conflicting state authority, Petitioner's assertion that the Interim Trial Ruling conflicts with existing case law is not supported by any evidence. In fact, despite pages and pages of rhetoric, Petitioner has been unable to cite even one case which is in any way inconsistent with the lower court's Interim Trial Order.

Petitioner also argues that the Commissioner has stepped into the shoes of the insolvent company. As always, Petitioner fails to understand that the liquidation of the Mission Companies forever altered the relationship between Mission and its reinsurers. Insurance insolvency and the liquidation process creates a change in capacity

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owing), there can be no set-off claim by Petitioner. What Petitioner is seeking is rescission not set-off.

which affects reinsurance arrangements. After receivership, the capacity of the company changes. The assets of the corporation become a trust fund dedicated to the benefit of its creditors in the order of priorities established in Section 1033 of the Insurance Code. Section 1057 of the Insurance Code provides:

> In all proceedings under this article, the Commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending.

See also, Cal. Ins. Code §§ 1011 and 1037.

Under this circumstance, the entity who contracted with the reinsurer prior to receivership is replaced by the Liquidator, as trustee. Thus, what was owed to the company pre-receivership is owed to the trust post-receivership. Capacity must be construed in the context of all provisions of the Insurance Code and not in isolation.

Petitioner argues that the lower courts order is contrary to existing law in California and other jurisdictions. Many California courts have denied the remedy of rescission where there would be a prejudice to the rights of third parties. These include: *Mitchell v. Grass Valley Gold Mines Co.*, 206 Cal. 609, 615-617 (1929) where the court denied an effort to rescind an agreement to convey a mineral right and to cancel a deed due to the intervention of the rights of third parties[9]; *Beckwith v. Sheldon*, 165 Cal. 319, 324-325 (1913) where alleged fraud in the

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[9]At page 421 the Court says: "When the rights of others have intervened, and the circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining parties left to their action at law."

inducement of a transfer of water rights to a corporation was held insufficient to permit rescission where stock had been sold to third persons and sums had been spent in making improvements[10]; *Meyers v. Merillion*, 118 Cal. 352, 356 (1897) where fraud in the sale of a partnership interest from one partner to the other was held insufficient to rescind the sale where there had been the creation of a subsequent partnership with a third party[11]; *Angle v. United States Fidelity & Guar. Co.*, 201 Cal. App. 2d 758, 762-763 (1962) where the court denied rescission of an insurance binder where doing so would retroactively increase the burden on another insurer who was a third party[12]; and *Setchell v. Prochaska*, 8 Cal. App. 2d 541 (1935) where the court refused to rescind a deed even though it was invalidly issued where to do so would prejudice the rights of a third party mortgagee whose rights had intervened.

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[10]At page 1051 the Court says: "It is, of course fundamental that, where the rights of others have intervened and circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining party left to his other remedies."

[11]This Court makes the same statement as in *Beckwith*, *supra*. In fact, *Beckwith* cites *Meyers* for the proposition.

[12]At page 394 the opinion provides: "However, there can be no rescission where the rights of third parties would be prejudiced... [The court then quotes the same quote from *Beckwith* which we quote, *supra*.] in the instant case, the right of Safeguard to have its liability prorated on the basis of the 'whole' insurance, as it existed at the time of the fire, intervened. A rescission of the United binder, if given retroactive effect, would cause substantial injury to Safeguard by increasing its proportionate share of the total coverage." Exactly the same thing would occur in the instant case if rescission were permitted.

An analogous case is *Glacier Gen. Assurance Co. v. Casualty Indem. Exch.*, 435 F. Supp. 855 (D.C. Mont. 1977). In that case the reinsurer sought to rescind a "loss fund agreement," which was a kind of reinsurance arrangement, on the grounds of fraud and a breach of warranty. The reinsurer claimed that its damage claim was inadequate because Glacier had become insolvent.

The court denied the rescission and held that the reinsurer was restricted to a damage claim. The court said:

> The remedy of rescission is equitable in nature and normally is used to restore the parties to a previously-existing condition. Apart from the fact that in this case it would be impossible to restore Glacier and CIE to their previously-existing condition, *a court of equity cannot blind itself to the fact that third parties are involved.* If Glacier is relieved of its obligations to reinsure, someone other than CIE or its reinsurers will bear the burden, and the governmental policy expressed by the commissioner's order[13] approving the loss fund agreement will be frustrated. A party should not, at the time he enters into a contract with one person, which does alter the status of others, be permitted to contemplate a rescission as to the one without regard to the consequences to the others. There is some evidence that this was Glacier's thought. A court of equity should not use the remedy of rescission to accomplish such a result.

Id. at 861. That court had previously noted that if there were a rescission the "burden of open claims would fall on the policyholders or claimants, or some state-created

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[13]Protection of the policyholders and claimants.

fund." As shown above, the trial court's Order is supported by existing law and thus there is no basis for jurisdiction.

II.

There Has Been No Violation of Petitioner's Equal Protection Rights

A. States May Enact Police Power Statutes Regulating Insurance Companies

The United States Constitution leaves to the states its police power, the inherent power of the state to subject individual rights to reasonable regulation for the general welfare. *See*, *Nebbia v. New York*, 291 U.S. 502 (1934). The police power is one of the broadest of governmental powers and private rights of property must yield to its operation. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1933). The Equal Protection Clause of the Fourteenth Amendment is commonly invoked as a limitation on the exercise of the state police power. If certain activities are singled out and subjected to regulation, the classification must not be improperly discriminatory. As stated by Petitioner, under an equal protection analysis, a state law which regulates economic activity will be upheld if it bears a rational relationship to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976).

The regulation of insurance companies by the states is a valid exercise of the state's police power and such regulation will be upheld if it bears a rational relationship to a legitimate state interest. It is well settled that insurance is a business affected with the vital public interest and that the rights of private parties, including the right of contracting, must be subordinated to the

overriding public interest. *Calfarm Ins. Co. v. Deukmejian* 48 Cal. 3d 805 (1989); *Nebbia v. New York*, 291 U.S. 502 (1934), and *Osborn v. Ozlin*, 310 U.S. 53 (1940).

The beginning point in any analysis of a whether the regulation of insurance companies is a matter left to the states is the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-15, which provides in part:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

Because Congress, through the *McCarran-Ferguson Act*, has provided that the states are to regulate the business of insurance, and have furthered that dictate through the exclusion of insurance companies from the protection of the bankruptcy laws, 11 U.S.C. § 109(b)(2), federal courts *must defer* to state proceedings for the rehabilitation, conservation, or liquidation of insurance companies. The reasoning behind this "hands off" approach was clearly articulated by the Fourth Circuit Court of Appeals in *Sims v. Fidelity Assurance Ass'n*, 129 F.2d 442 (4th Cir. 1942) *aff'd*, 318 U.S. 608 (1943). In speaking of the exception of insurance companies from bankruptcy protection, the Court stated:

> No reasons for making these exceptions were assigned by the committees of Congress, but they may be surmised to lie in the public or quasi public nature of the business, involving other interests than those of creditors, in the desirability of unarrested operation, the completeness of state regulation, including provisions for insolvency, and the inappropriateness of the bankruptcy machinery to their affairs. All

> states, probably, have in fact regulated insurance companies of all kinds, and provided for their liquidation. The affairs of an embarrassed or insolvent insurance company often require much technical skill and judgment and time for their adjustment and a carrying forward of the business, to prevent lapses and to permit reinsurance to simplify them. (quoting *In Re Supreme Lodge of the Masons Annuity*, 286 F. 180, 184 (N.D. Ga. 1923)
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> * * *
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> It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. (quoting *Woolsey v. Security Trust Co.*, 74 F.2d 334, 337 (5th Cir. 1934)
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> * * *
>
> The most natural inference is that Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise.

Id. at 448-49.

The State of California has enacted comprehensive statutes, rules and regulations to regulate the business of insurance, including the liquidation of insurance companies. *See* California Insurance Code Section 1011 *et seq.* The statute in question, California Insurance Code Section 1019, is part of this comprehensive scheme. The Mission Companies are in liquidation pursuant to those

comprehensive rules and regulations. When an insurance company experiences financial difficulties, regulation intensifies for the protection of policyholders and the public generally. Under the California Insurance Code, the Liquidator, is vested with title to the property of the Mission Companies and is charged with liquidating the Mission Companies for the benefit of their policyholders and creditors. Insurance laws as enacted by California and the several states provide general and pervasive regulation of the business of insurance beginning with the formation and licensing of insurance companies, during their operation as solvent companies with their policyholders and agents, and through their winding up. Such "cradle to grave" regulation of insurers forms a backdrop against which the California statutes governing insurance liquidation must necessarily be viewed in determining whether to grant the instant Petition.

Petitioner argues that there is no rational basis for the Respondent Court's interpretation of California Insurance Code Section 1019.[14] As set forth in detail below, the Respondent Court's decision is proper and furthers a legitimate state interest.

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[14]It is not clear from Petitioner's brief whether Petitioner is raising an impairment of contract issue. If Petitioner is making such an argument, than it is important to note that the only argument Petitioner can make is that the impairment is a result of the lower court's decision. The impairment of a contract by judicial decision does not raise a federal question which can be reviewed by the United States Supreme Court. *See, Central Land Co. v. Laidley*, 159 U.S. 103 (1895); *Kryger v. Wilson*, 242 U.S. 171 (1916). Further, rescission is merely a remedy to the obligations of a contract and remedies to a contract may be impaired without violating the United States Constitution. *See, Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398, 430 (1934).

The entire California statutory scheme dealing with insurance indicates a legislative intent to create a system to protect the public interest in insurance. *See generally, Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761 (1937) *aff'd. sub nom. Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L. Ed. 182 (1938). All parties are deemed to have contracted with the law in mind, and, thus, Petitioner contracted with the knowledge that there was a statutory scheme in place in this state which would control their rights in the event of insolvency.

Once the Mission Companies became insolvent and all their assets became a trust fund for the benefit of all policyholders and other creditors in accordance with the California Insurance Code and the other provisions of the law, then a whole new series of third parties intervening rights came into play. It is not actually the contract that this Petitioner now seeks to rescind, it is the insolvency statutory scheme that it seeks to rescind. To permit rescission of the contract would be to destroy the matrix of rights and duties that exists under the statutes and would deprive the Mission Companies' estate of millions of dollars that would otherwise go to the policyholders and other creditors in accordance with the statutory scheme. Thus, Petitioner's equal protection argument does not withstand scrutiny.

III.

There Has Been No Violation of Petitioner's Due Process Rights

Like the test for equal protection violations set forth above, a statute regulating economic activity and challenged under due process grounds, will be upheld if it bears a reasonable relation to a legitimate state interest. The validity of a statute under the due process clause is

determined by its reasonableness under the police power of the state. *See, Nebbia v. New York*, 291 U.S. 502, 537 (1934). As discussed above, the regulation of insurance companies is a valid exercise of state police power. The statute in question, California Insurance Code Section 1019 indicates a legislative intent to create a system to protect the public interest in insurance and is thus a reasonable exercise of the state police power.

Petitioner argues that the trial court's Interim Trial Ruling violates its due process rights. As a result of the ruling, Petitioner claims that it is forever barred from asserting its claims against the Commissioner. The trial court's order provides for the adjudication of Petitioner's claims. Petitioner's claims are wholly preserved by the very terms of the Order. On page 5 of the Order, the court held that Defendants

> fraud claims can be adjudicated, and, if established they can be paid pro rata with all the other claims by others injured by the machinations of the principals of Mission and/or PRMC which led to the liquidation of the Mission companies.

Thus, it is quite clear from the Order itself that Petitioner's claims are preserved and that it has the right to have those claims adjudicated in the normal claims process along with all of the other claimants. This outcome does not prejudice Petitioner nor does it deny it any due process rights it may have. In fact, all the Order does is place Petitioner on even footing with all other claimants of the same class, taking them out of the place they wish to be, a place of preference. The Order of the trial court is therefore wholly just and fair, not only to Petitioner, but to all other claimants as well.

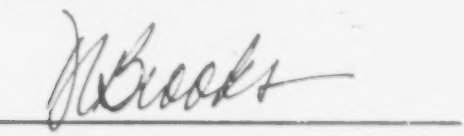
CONCLUSION

Petitioner has not only failed to preserve its federal questions in the lower courts such that there is jurisdiction in this Court, it has also not presented any evidence to support its argument that any violations of its due process and equal protection rights have occurred. Therefore, the Petition for Writ of Certiorari should be denied.

DATED: December 23, 1991

Respectfully submitted,

KARL L. RUBINSTEIN
DANA CARLI BROOKS
ROBERT H. NUNNALLY, JR.
KATHLEEN. M. MCCAIN
RUBINSTEIN & PERRY

By: 

DANA CARLI BROOKS
Counsel for Record for
Real Party in Interest
2600 Wilshire Boulevard, 5th Floor
Los Angeles, California 90057
(213) 487-4769